General Counsel's Office

American Express
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January 30,2004

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave. N.W.
Washington, D.C. 20551

Re: Docket Nos. R-1167, R-1168, R-1169, R-1170, R-1171

Dear Ms. Johnson,

We appreciate the opportunity to comment on the Board's proposals regarding "clear and conspicuous" disclosures under Regulations B, DD, E, M, and Z. American Express values the effort that the proposal represents, and agrees that consumer disclosures should be provided in forms that are as easy to use as they can reasonably be made. However, we have concluded that we must recommend that the Board to withdraw its proposal.

The stated aim of the proposal is to extend Regulation P standards for "clear and conspicuous" disclosures to Regulation Z and four other Board rules. The notice identifies no specific problems with particular disclosures, but rather suggests that the impetus for the rule is an assumption that "consistency among the regulations should facilitate compliance by institutions." 68 Fed. Reg. 68,793, 68,794 (Dec. 10, 2003).[1] We believe the proposal would be counterproductive, We believe that its prescriptions would force financial institutions to engage in complex and expensive redesigns of dozens of documents, impose substantial increases in printing and mailing costs, and trigger a flood of hypertechnical litigation. These changes, in our view, would harm consumer interests because they would result in making many documents harder to navigate, and by driving up the cost of credit and other financial services. We believe that attempting to adopt detailed one-size-fits-all standards to govern all of the disclosures covered by the five affected regulations is misguided and cannot be fixed by minor changes in

[1] Because our business is most directly affected by Regulation Z, we have cited to the Regulation Z notice, proposed regulation, and proposed commentary. However, the proposal raises similar problems with regard to the other affected regulations.

language or emphasis, We therefore respectfully request that the Board withdraw the proposal and reconsider its approach.

We outline ow specific concerns below.

A. The Proposed Rule Would Impose New Substantive Requirements without Acknowledgement or Justification

The new regulations and commentary would alter the basic concept of "clear and conspicuous*'disclosures and effectively reverse a 25-year-old Board policy adopted after the Truth in Lending Simplification Act of 1980. Pub. L. 96-221, Tit. VI, 94 Stat. 132, 168 (1980). After Congress passed that legislation in hopes of "eliminat[ing] litigation which is based on violations of a purely technical nature," S. Rep. No. 96-73, at 10 (1979), the Board dropped several rigid formatting and type size requirements out of Regulation Z in favor of the broader "clear and conspicuous" standard. 46 Fed. Reg. 20,848, 20,856-57, 20,871-73 (Apr. 7, 1981); 45 Fed. Reg. 29,702, 29,703 (May 5,1980). Thus, current Board guidance requires that such disclosures must be in "reasonably understandable form," but with certain limited exceptions "does not require that disclosures be segregated from other material or located in any particular place on the disclosure statement, or that numerical mounts or percentages be in any particular type size." Comment 226.5(a)(1)-1; see *also* Consumer Compliance Handbook, Regulation Z, 1-156 (Oct. 1996) (articulating the standards for examiner guidance on "clear and conspicuous" as follows: disclosures "should not be buried in fine print and should be visible without undue searching. They must be phrased to communicate information clearly and effectively.").

In contrast to these current, flexible standards, the proposed regulation would require that a disclosure be both "reasonably understandable *and* designed to call attention to the nature and significance of the information in the disclosure," Proposed 12 C.F.R § 226.2(a)(27) (emphasis added), and the proposed commentary would prescribe that disclosures meet particular type *size* restrictions and use "plain-language heading[s]" and "distinctive type size, style, and graphic devices, such as shading or sidebars" to call attention to disclosures that are integrated into documents containing other types of information, Proposed Comment 2(a)(27)-2. The Board's notice states that "segregating federally mandated disclosures from other information is more likely to satisfy [this new] clear and conspicuous standard," 68 Fed. Reg. at 68,794, yet provides no explanation for this major change. Indeed, the preamble implies (inaccurately, in our view) that the proposal is a relatively minor technical adjustment designed merely to add language that "articulates with greater precision . . . the concepts underlying the duty to provide disclosures that consumers will notice and understand,'' without acknowledging that the "call attention to" requirement is a fundamental change in the concept of "clear and conspicuous" disclosures, *Id.*

Because the new standards would prescribe affirmative measures to call attention to every disclosure mandated by Regulations B, DD, E, M, and Z, they will require lengthy and expensive compliance reviews and redesigns of virtually every type of customer communication. The Board has provided no justification for imposing such a heavy burden, much less a policy rationale for requiring highlighting and segregation across the board. We believe that prescribing that disclosures mandated by Regulations B, DD, E, M, and Z be segregated from other information, would make existing documents that we organized on functional principles significantly more difficult to understand and use. Take, for example, our standard credit card agreements, which we have organized topically so that consumers can generally find all information on a particular subject in a single location, regardless of whether its inclusion is required by Regulation Z, by contractual considerations, or simply as a means of explaining important account features and procedures. Reorganizing our agreement to pull mandated disclosures away from related information and/or to focus subheadings on regulatory disclosures rather than functional topics would make the document more cluttered and difficult to navigate. Such reorganization would also tend to emphasize even relatively minor TILA disclosures over important contract terms and disclosures that are required by other state and federal laws, Yet the proposal would drive us toward such changes, if we hope to avoid lawsuits under the new standards.

Moreover, the new "call attention to" criteria are very open-ended, such that neither we nor the courts could be sure when they have been satisfied. For example, the Board has failed to provide any guidance whatsoever on how to draw attention to "the nature and significance" of particular disclosures: The mandate might mean that financial institutions must revise periodic statements and other transactional documents to include detailed explanations of the significance of particular dates, terms, and types of transactions. It might mean that more important disclosures should be accompanied by more dramatic formatting devices, though the Board has failed to provide any methodology for determining relative importance, Or, the nature and significance requirements might mean something else entirely. Without more concrete guidance and model forms that demonstrate: exactly what combination of graphic devices are required to call attention to and segregate particular disclosures, the new standards will impose broad new litigation *risks* on all financial institutions,

B. Tbe Commentary's Prescriptions on Type Size, Margins, and Line Spacing Would *Also* Impose Severe Cost Burdens

Although the Board's proposal does not directly mandate a type size requirement for all disclosures under Regulations B, DD, E, M, and Z, it casts doubt on any disclosure that is printed in less than 12-point type. See, *e.g.*, Proposed Comment 226.2(a)(27)-2(ii) ("Disclosures in 12-point type generally meet [the new requirements]. Disclosures printed in less than 12-point type do not automatically violate the standard; however, disclosures in less than 8-point type would likely be too small to satisfy the standard."). This formulation is currently applied to Schumer Box disclosures, and financial institutions will therefore face significant pressure to increase all disclosures to the type sizes they have used for Schumer Boxes. *See* Comment 226.5a(a)(2)-1. This safe harbor sets too high a price. We estimate that increasing our credit card agreement to 12-point type would increase our printing and postage costs by approximately 34%.[2]

2 We base this estimate on a recent mailing we undertook of updated credit card agreements to 24 million of our cardholders. The total cost of that mailing was approximately $10,100,000. Our practice is to print our credit card agreements in 8 point type. If we had printed these agreements in 12 point type (without attempting to segregate and "call attention to"

Additionally, if we must segregate and increase the type size we use for Regulation Z disclosures on our periodic statements, we estimate that our annual cost of providing periodic statements would increase by approximately $1,800,000.

The Board's notice does not appear to recognize either the financial burdens or strategic trade-offs involved in imposing these new requirements. Making disclosure documents significantly longer—particularly when combined with extensive cross-referencing in light of the Board's new segregation requirements—would make them more intimidating to many consumers. Moreover, the measures that financial institutions adopt to try to mitigate the cost burdens of the new requirements would also have disadvantages to consumers. One option, for instance, would be to shrink the type size used in an institution's Schumer Boxes to try to maintain consistency of interpretation; another would be to strike all information from disclosure documents that is useful to consumers but not mandated by statute. Thus, we believe that the new requirements would be largely counterproductive.

C. The Proposal Fails to Give Appropriate Guidance or Necessary Flexibility for Applying the Requirements to the Diverse Range of Affected Documents

The proposed rule is also problematic because the Board is attempting to apply standards that were developed for use in writing standalone privacy notices under Regulation P to a far more varied and complex range of documents governed by Regulations B, DD, E, M, and Z, without making allowances or adiiptations. For example, the new standards for "reasonably understandable" disclosures state categorically that financial institutions should "[p]resent the information in the disclosure in clear, concise sentences, paragraphs, and sections," "[u]se short explanatory sentences or bullet lists whenever possible," "[u]se definite, concrete, everyday words and active voice whenever possible," and "[a]void legal and highly technical business terminology whenever possible." Proposed Comment 226.2(a)(27)-1. Yet the Board leaves no latitude for the inherent difficulties involved in explaining complex computation methods, or for the fact that contractual documents such as credit card agreements must be precise—even at the expense of some brevity and simplicity—for legal reasons. At the other extreme, the Board provides no guidance for how to determine whether ATM slips, account statements, and other documents designed primarily to convey transaction information satisfy criteria that were largely meant to make *textual* documents easier to read, such as segregating or highlighting required elements or using "wide margins." Instead, the proposed rule appears to hold all disclosures to the same standards as relatively simple standalone disclosures explaining how financial institutions deal with customer records.[3]

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the various Regulation Z disclosures within them), that cost would have increased to approximately $13,500,000.

[3] Even with regard to Regulation P, the Board has acknowledged some dissatisfaction with the clarity of current privacy notices and is currently seeking comments on whether to change the "format" and "language used in privacy notices." 68 Fed. Reg. 75,164, 75,166 (Dec. 30, 2003).

D. A Wholesale Revision of Clear and Conspicuous Standards in Liability-Causing Regulations Is Not Warranted When No Specific Deficiencies Have Been Identified

Finally, placing the new "clear and conspicuous" standards into regulations subject to class action enforcement would distort application of the rules and impose serious and unjustified litigation risk on financial institutions. In contrast to Regulation P, which is subject to administrative enforcement, 15 U.S.C. § 6805, "hypertechnicality reigns" under the Truth in Lending Act and other similar consumer legislation because even minor violations causing no actual consumer confusion are subject to statutory damages on a class action basis, with no requirement to show any consumer injury. *Cowen v. Bank United of Tex., FSB*, 70 F.3d 937, 941 (7th Cir. 1995). Thus, even though the Board commentary describes its prescriptions as "[e]xamples" of clear and conspicuous disclosures, Proposed Comment 226.2(a)(27)-1, -2, financial institutions will be at risk if they fail to follow any aspect of the new prescriptions. Instead, the best way to reduce the risk of litigation—though *not* to serve consumers' interests—would be to mechanically apply every single prescription to every single disclosure form.[4]

Given the nature of the proposed standards, moreover, financial institutions could never be sure that they had protected themselves from legal liability or hope to obtain consistent enforcement decisions from judges and juries. As mentioned above, the proposal provides no guidance on how to "call attention to the ... significance" of particular disclosures or how to determine whether document margins are sufficiently "wide" and line spacing sufficiently "ample" to meet Board requirements. Similarly with regard to the "reasonably understandable" criteria, the proposal directs financial institutions to "[u]se short explanatory sentences or bullet lists *whenever* possible," "[u]se definite, concrete, everyday words and active voice *whenever* possible," and "[a]void legal and highly technical business terminology *whenever* possible," yet provides no guidance for determining when a violation of these rules is sufficiently unavoidable that no liability should attach. Proposed Comment 226.2(a)(27)-1 (ii), (iii), (v).

The proposed standards may be good general principles of writing and document design, but they are not good regulatory standards for application by judges and juries in statutory damages cases. The criteria provide a laundry list of potential litigation issues and would likely

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[4] The Board has previously incorporated some Regulation P-like standards into rules governing insurance disclosures, but that regulation also affects only a small and discrete set of statements. 12 C.F.R. § 208.84. Moreover, the insurance guidance explicitly indicates that segregation is not required, does not prescribe particular type sizes, and omits the criteria defining "reasonably understandable," which are particularly prone to litigation (i.e., disclosures must use "short explanatory sentences or bullet lists whenever possible," avoid "legal and highly technical business terminology whenever possible," etc.). *Compare* 12 C.F.R. 208.84; 65 Fed. Reg. 75,822, 75,828 (Dec. 4, 2000), *with* Proposed 12 C.F.R. § 226.2(a)(27); Proposed 12 C.F.R. pt. 226, Supp. I, Comment 226.2(a)(27)-1. Perhaps most importantly, institutions have a greater measure of discretion in how to apply these standards in the insurance context because such disclosures (unlike Regulation Z disclosures) are not made susceptible to hypertechnical class action lawsuits for statutory damages. 12 U.S.C. § 1831x(f).

be cited as substantive changes, over-riding decades of more nuanced case law interpreting the current "clear and conspicuous" standard. Yet the Board's prescriptions are too open-ended and aspirational to provide clear, consistent rules of liability or safe harbors. In the hypertechnical environment of TILA litigation, a single perceived technical violation of the prescription against passive voice, or a single failure to highlight regulatory terms, could subject a financial institution to the risk of $500,000 in statutory damages, even though a disclosure may be perfectly understandable and noticeable to consumers.

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We therefore urge the Board to withdraw its current proposal, and to reexamine Congress's directive in the Truth in Lending Simplification Act to develop safe harbors and take other steps to reduce purely technical litigation. At the time of the Simplification Act, the Board promised to eliminate "any burdens not justified by substantial consumer benefits" in Regulation Z. 45 Fed. Reg. 80,648, 80,649 (Dec. 5,1980). Yet the Board appears now to be dictating a thorough overhaul of all disclosure documents, according to new prescriptions -- although it has identified no problems with its current clear and conspicuous guidance or with financial institutions' current disclosure practices (much less "*substantial* consumer benefits") to justify this expense and effort. Moreover, as discussed, we question whether the proposal would likely result in net benefits to consumers in any event.

Respectfully submitted,

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